ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 06-1276 (CONSOLIDATED WITH NO. 06-1317)

VONAGE HOLDINGS CORPORATION, *ET AL.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

THOMAS O. BARNETT
ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

SAMUEL L. FEDER
GENERAL COUNSEL

ERIC D. MILLER
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
ASSOCIATE GENERAL COUNSEL

JOHN E. INGLE
DEPUTY ASSOCIATE GENERAL COUNSEL

JAMES M. CARR
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

All parties, intervenors, and amici appearing in this Court are listed in the brief for petitioner Vonage Holdings Corporation. All parties that appeared before the Federal Communications Commission are listed in Appendix B to the order on review. *See* 21 FCC Rcd at 7559-69 (JA -).

B. Ruling Under Review

Universal Service Contribution Methodology, 21 FCC Rcd 7518 (2006) (JA) ("*Order*").

C. Related Cases

The order on review has not previously been before this Court. Counsel are not aware of any related cases pending in this or any other Court.

TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES PRESENTED 2

STATUTES AND REGULATIONS 3

STATEMENT OF FACTS 3

A. The Origins Of "Universal Service" 3

B. The Telecommunications Act Of 1996 4

C. The Implementation Of Section 254 6

D. The Order On Review 9

(1) Authority Over Interconnected VoIP Providers 11

(2) Procedures For Implementation 15

SUMMARY OF ARGUMENT 18

STANDARD OF REVIEW 21

ARGUMENT 23

I. CCIA HAS FAILED TO DEMONSTRATE THAT IT HAS STANDING TO CHALLENGE THE ORDER ON REVIEW 23

II. THE COMMISSION REASONABLY FOUND THAT IT HAD AUTHORITY TO REQUIRE UNIVERSAL SERVICE CONTRIBUTIONS BY INTERCONNECTED VOIP PROVIDERS 24

A. Section 254(d) Authorized The Commission To Require USF Contributions By Interconnected VoIP Providers 25

B. The Commission Had Ancillary Jurisdiction Under Title I To Require USF Contributions By Interconnected VoIP Providers 34

III. THE COMMISSION'S *ORDER* IS NOT INCONSISTENT WITH OTHER FCC POLICIES 37

Page

IV. THE COMMISSION ADOPTED REASONABLE PROCEDURES FOR IMPLEMENTING UNIVERSAL SERVICE CONTRIBUTION REQUIREMENTS FOR INTERCONNECTED VOIP PROVIDERS 41

A. The Commission Set A Reasonable Safe Harbor For Interconnected VoIP Service 42

B. The Commission Reasonably Required Interconnected VoIP Providers To Obtain Prior FCC Approval Of Any Traffic Studies On Which They Propose To Rely 47

C. The Commission Reasonably Decided To Continue Requiring USF Contributions For Two More Quarters From Carriers Supplying Transmission To Interconnected VoIP Providers 50

CONCLUSION 53

TABLE OF AUTHORITIES

Page

Cases

* *ACS of Anchorage, Inc. v. FCC,* 290 F.3d 403 (D.C. Cir. 2002) 42, 48, 52

* *American Chemistry Council v. Department of Transportation,* 2006 WL 3316788 (D.C. Cir. 2006) 23

American Council on Education v. FCC, 451 F.3d 226 (D.C. Cir. 2006) 32, 44

American Library Association v. FCC, 406 F.3d 689 (D.C. Cir. 2005) 35

* *American Public Communications Council v. FCC,* 215 F.3d 51 (D.C. Cir. 2000) 46

AMSC Subsidiary Corp. v. FCC, 216 F.3d 1154, 1161 (D.C. Cir. 2000), *cert. dismissed,* 531 U.S. 1121 (2001) 25

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) 4

Barlow v. Collins, 397 U.S. 159 (1970) 22

Cassell v. FCC, 154 F.3d 478 (D.C. Cir. 1998) 44

Cellco Partnership v. FCC, 357 F.3d 88 (D.C. Cir. 2004) 22

Cellular Telecommunications Industry Association v. FCC, 168 F.3d 1332 (D.C. Cir. 1999) 3

* *Chevron USA v. Natural Resources Defense Council,* 467 U.S. 837 (1984) 21

Competitive Telecommunications Association v. FCC, 309 F.3d 8 (D.C. Cir. 2002) 42, 52

* *Consumer Electronics Association v. FCC,* 347 F.3d 291 (D.C. Cir. 2003) 23, 46

* *Covad Communications Co. v. FCC,* 450 F.3d 528 (D.C. Cir. 2006) 43, 44

FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) 33

* *FCC v. WNCN Listeners Guild,* 450 U.S. 582 (1981) 33

Freeman Engineering Associates v. FCC, 103 F.3d 169 (D.C. Cir. 1997) 49

Hercules Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978) 44

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977) 23

In re Core Communications, Inc., 455 F.3d 267 (D.C. Cir. 2006) 38

* *International Brotherhood of Teamsters v. Transportation Security Administration,* 429 F.3d 1130 (D.C. Cir. 2005) 24

KERM, Inc. v. FCC, 353 F.3d 57 (D.C. Cir. 2004) 24

Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) 38

MCI Telecommunications Corp. v. FCC, 750 F.2d 135 (D.C. Cir. 1984) 42, 48, 52

* *Melcher v. FCC,* 134 F.3d 1143 (D.C. Cir. 1998) 33

Mobile Communications Corp. of America v. FCC, 77 F.3d 1399 (D.C. Cir.), *cert. denied,* 519 U.S. 823 (1996) 37

Mobile Relay Associates v. FCC, 457 F.3d 1 (D.C. Cir. 2006) 23

MobileTel, Inc. v. FCC, 107 F.3d 888 (D.C. Cir.), *cert. denied,* 522 U.S. 948 (1997) 33

National Association of Broadcasters v. FCC, 740 F.2d 1190 (D.C. Cir. 1984) 41

* *National Association of State Utility Consumer Advocates v. FCC,* 372 F.3d 454 (D.C. Cir. 2004) 4, 33, 44

* *National Cable & Telecommunications Association v. Brand X Internet Services,* 125 S. Ct. 2688 (2005) 6, 12, 22, 29, 31, 39, 41, 49

National Cable & Telecommunications Association v. Gulf Power Co., 534 U.S. 327 (2002) 32

Oil, Chemical & Atomic Workers International Union v. NLRB, 46 F.3d 82 (D.C. Cir.), *cert. denied,* 516 U.S. 821 (1995) 22

Oklahoma Natural Gas Co. v. FERC, 28 F.3d 1281 (D.C. Cir. 1994) 22

Pharmaceutical Research & Manufacturers of America v. Thompson, 362 F.3d 817 (D.C. Cir. 2004) 22

Public Service Commission of Maryland v. FCC, 909 F.2d 1510 (D.C. Cir. 1990) 38

Public Utility Commission of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989) 38

Rainbow/PUSH Coalition v. FCC, 330 F.3d 539 (D.C. Cir. 2003) 23

* *Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988) 15, 20, 36

* *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002) 23

Southern California Edison Co. v. FERC, 443 F.3d 94 (D.C. Cir. 2006) 46

Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999), *cert. dismissed*, 531 U.S. 975 (2000) 4, 6, 7, 13

Texas Utilities Electric Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993) 22

United States Cellular Corp. v. FCC, 254 F.3d 78 (D.C. Cir. 2001) 49

United States Telecom Association v. FCC, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 543 U.S. 925 (2004) 49

United States v. Southwestern Cable Co., 392 U.S. 157 (1968) 14, 34

Verizon Communications Inc. v. FCC, 535 U.S. 467 (2002) 3, 4

Virgin Islands Telephone Corp. v. FCC, 198 F.3d 921 (D.C. Cir. 1999) 6, 26

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 41, 49

* *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) 44

WorldCom, Inc. v. FCC, 246 F.3d 690 (D.C. Cir. 2001) 34

Administrative Decisions

Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 17 FCC Rcd 3019 (2002) 41

Page

Communications Assistance for Law Enforcement Act and Broadband Access and Services, 20 FCC Rcd 14989 (2005), *aff'd, American Council on Education v. FCC*, 451 F.3d 226 (D.C. Cir. 2006) 44

Federal-State Joint Board on Universal Service, 12 FCC Rcd 8776 (1997), *aff'd in part and rev'd in part, Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. dismissed*, 531 U.S. 975 (2000) 6, 7, 26, 27, 39

Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501 (1998) 39

Federal-State Joint Board on Universal Service, 13 FCC Rcd 21252 (1998) 8

Federal-State Joint Board on Universal Service, 17 FCC Rcd 24952 (2002) 7, 9

Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd 4798 (2002) 31

IP-Enabled Services, 20 FCC Rcd 10245 (2005), *petitions for review pending, Nuvio Corp. v. FCC*, No. 05-1248 (D.C. Cir. argued September 12, 2006) 14, 35, 40, 44

Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, 19 FCC Rcd 3307 (2004) 32

Proposed Fourth Quarter 2006 Universal Service Contribution Factor, 21 FCC Rcd 10120 (OMD 2006) 7, 10

Vonage Holdings Corp., 19 FCC Rcd 22404 (2004), *petitions for review pending, Minnesota Public Utilities Commission v. FCC*, No. 05-1069 (8th Cir. argued January 12, 2006) 37, 38, 45

Statutes and Regulations

5 U.S.C. § 706(2)(A) 22

28 U.S.C. § 2342(1) 1

28 U.S.C. § 2344 1

* 47 U.S.C. § 151 .... 3, 15, 35

47 U.S.C. § 152(a) 14, 34

47 U.S.C. § 153(20) 12

47 U.S.C. § 153(33) 14, 35, 36

47 U.S.C. § 153(43) 5, 25, 31

47 U.S.C. § 153(44) 5, 25

47 U.S.C. § 153(46) 5, 12, 25, 31

47 U.S.C. § 153(52) 14, 35, 36

* 47 U.S.C. § 154(i) 35

47 U.S.C. § 230(b)(2) 33

47 U.S.C. § 254 2

47 U.S.C. § 254(b)(5) 5

47 U.S.C. § 254(b)(6) 5

* 47 U.S.C. § 254(d) 2, 5, 19, 25, 26, 29

47 U.S.C. § 254(h)(1)-(2) 5

47 U.S.C. § 402(a) 1

* 47 U.S.C. § 405 .... 38, 49

47 C.F.R. § 9.3 11

47 C.F.R. § 54.706(b) 18, 50

47 C.F.R. § 54.709(a)(1)-(3) 7

47 C.F.R. § 54.709(a)(2) 7

47 C.F.R. § 54.709(b)-(c) 8

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 4

Others

* D.C. Cir. Rule 28(a)(7) 1, 23

iLocus Weekly Newsletter, March 21, 2006 .... 16, 43

iLocus Weekly Newsletter, September 16, 2005 .... 16, 42

William E. Kennard, Op-Ed, *Spreading the Broadband Revolution*, N.Y. Times, October 21, 2006 9

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

ACE	*American Council on Education v. FCC*, 451 F.3d 226 (D.C. Cir. 2006)
ALA	*American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005)
CCIA	Computer & Communications Industry Association
DSL	digital subscriber line
LEC	local exchange carrier
NASUCA	*National Association of State Utility Consumer Advocates v. FCC*, 372 F.3d 454 (D.C. Cir. 2004)
PSTN	public switched telephone network
TOPUC	*Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. dismissed*, 531 U.S. 975 (2000)
USAC	Universal Service Administrative Company
USF	Universal Service Fund
VoIP	Voice over Internet Protocol

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 06-1276 (CONSOLIDATED WITH NO. 06-1317)

VONAGE HOLDINGS CORPORATION, *ET AL.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

STATEMENT OF JURISDICTION

The Federal Communications Commission issued the order on review on June 27, 2006. Vonage Holdings Corporation and the Computer & Communications Industry Association ("CCIA") filed petitions for review within the time period prescribed by 28 U.S.C. § 2344. This Court has jurisdiction to review timely challenges to final FCC orders under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). As explained below in Part I of the Argument, however, CCIA's petition should be dismissed because CCIA has failed to establish its standing as required by D.C. Cir. Rule 28(a)(7) and the Court's scheduling order dated September 29, 2006.

STATEMENT OF ISSUES PRESENTED

To implement section 254 of the Communications Act, 47 U.S.C. § 254, the FCC has created a federal "universal service" fund, which subsidizes telecommunications services to make them affordable to all Americans. Section 254 requires every telecommunications carrier that provides interstate telecommunications services to contribute to the fund. The statute also states: "Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires." 47 U.S.C. § 254(d).

In recent years, the universal service contribution base has been shrinking. One reason for this development has been the growth of interconnected Voice over Internet Protocol ("VoIP") services, which compete directly with traditional voice telephone services. Interconnected VoIP providers – which had not heretofore been required to contribute to universal service – were luring customers away from traditional telecommunications carriers, which have historically made universal service contributions. As a result, those carriers' revenues – the basis for their universal service contributions – have declined.

To address this problem, and to ensure both the continued sufficiency of the universal service fund and a more equitable and nondiscriminatory contribution regime, the FCC in June 2006 ordered interconnected VoIP providers to start contributing to the fund. *Universal Service Contribution Methodology,* 21 FCC Rcd 7518 (2006) (JA) ("*Order*"). In the Commission's judgment, the public interest required that these "provider[s] of interstate telecommunications" make universal service contributions. This case presents the following issues:

(1) whether CCIA's petition for review should be dismissed because CCIA has failed to establish its standing;

(2) whether the Commission reasonably construed the Communications Act to permit the imposition of universal service contribution obligations on providers of interconnected VoIP services;

(3) whether the *Order* in this case deviated without explanation from other FCC policies; and

(4) whether the Commission adopted reasonable procedures for implementing universal service contribution requirements for interconnected VoIP providers.

STATUTES AND REGULATIONS

In addition to the statutes and regulations that are appended to the briefs for Vonage and the VON Coalition (an intervenor supporting petitioners), other pertinent statutes and regulations are set forth in the addendum to this brief.

STATEMENT OF FACTS

A. The Origins Of "Universal Service"

One of Congress's primary goals in creating the FCC was "to make available, so far as possible, to all the people of the United States, … a rapid, efficient, Nation-wide … wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. This goal was the source of the Commission's rate subsidy policy known as "universal service." *See Verizon Communications Inc. v. FCC,* 535 U.S. 467, 480 (2002).

For most of the last century, the FCC and state regulators sought to promote universal telephone service "largely through implicit subsidies … designed to shift costs from rural to urban areas, from residential to business customers, and from local to long distance service." *Cellular Telecommunications Industry Association v. FCC,* 168 F.3d 1332, 1334 (D.C. Cir. 1999) (internal quotations omitted). Without these cross-subsidies, "many customers in sparsely populated areas would be unwilling to pay the high rates necessary to cover the [local phone company's] cost of serving them." *National Association of State Utility Consumer Advocates v. FCC,* 372 F.3d 454, 456 (D.C. Cir. 2004) ("*NASUCA*").

B. The Telecommunications Act Of 1996

Until the 1990s, "local phone service was thought to be a natural monopoly," and states "typically granted an exclusive franchise in each local service area" to a single local exchange carrier ("LEC"). *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 371 (1999). This regulatory approach "made it simple to provide cross subsidies in aid of universal service" because each LEC, by virtue of its monopoly over the local markets it served, could easily shift some of its costs from one set of customers to another. *Verizon,* 535 U.S. at 480.

That all changed when Congress passed the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act extensively amended the Communications Act, replacing "the longstanding regime of state-sanctioned monopolies" with a dramatically different regulatory framework designed to open local telecommunications markets to competition. *AT&T,* 525 U.S. at 371.

Congress recognized that the existing system of implicit universal service subsidies could not long survive the introduction of local competition. Stripped of the protection of an exclusive franchise, an incumbent LEC "that tries to subsidize below-cost rates to rural customers with above-cost rates to urban customers is vulnerable to a competitor that offers at-cost rates to urban customers." *Texas Office of Public Utility Counsel v. FCC,* 183 F.3d 393, 406 (5^{th} Cir. 1999) ("*TOPUC*"), *cert. dismissed,* 531 U.S. 975 (2000). "[T]his pattern of subsidization could not persist if incumbent LECs were to compete against new entrants." *NASUCA,* 372 F.3d at 457.

To guard against the erosion of universal service support under the new regulatory scheme, Congress added section 254 to the Communications Act. Section 254 requires the FCC to replace the prevailing system of implicit universal service subsidies with "specific, predictable and sufficient" mechanisms "to preserve and advance universal service." 47 U.S.C. § 254(b)(5). The statute also expands the definition of "universal service" to include targeted subsidies for telecommunications services for rural health care providers, schools, and libraries. *Id.* §§ 254(b)(6), (h)(1)-(2).

Section 254(d) prescribes the source of funding for the FCC's universal service programs. First, it requires "[e]very telecommunications carrier that provides interstate telecommunications services" to "contribute, on an equitable and nondiscriminatory basis," to the universal service mechanisms established by the Commission. 47 U.S.C. § 254(d). In addition, section 254(d) states: "Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires." *Ibid.*

In a separate section, the 1996 Act defines some of the key terms in section 254(d). It defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). The statute separately defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(46). And the Act defines "telecommunications carrier" as "any provider of telecommunications services" except for "aggregators" of such services. *Id.* § 153(44). The Commission has construed "telecommunications carrier" to mean a common carrier, and this Court has upheld that construction. *See Virgin Islands Telephone Corp. v. FCC,* 198 F.3d 921, 925-27 (D.C. Cir. 1999); *see also National Cable & Telecommunications Association v. Brand X Internet Services,* 125 S. Ct. 2688, 2696 (2005) ("*Brand X*") ("The Act regulates telecommunications carriers … as common carriers.").

C. The Implementation Of Section 254

In accordance with section 254, the Commission in May 1997 established "a universal service support system that will be sustainable in an increasingly competitive marketplace." *Federal-State Joint Board on Universal Service,* 12 FCC Rcd 8776, 8780 (¶ 2) (1997) ("*Universal Service Order*"), *aff'd in part and rev'd in part, TOPUC*, 183 F.3d 393, *cert. dismissed,* 531 U.S. 975. This system consists of four different mechanisms that subsidize telecommunications services purchased by (1) consumers in high-cost areas, (2) low-income consumers, (3) eligible schools and libraries, and (4) eligible health care providers. *Id.* at 8792-97 (¶¶ 26-37).

To finance its universal service programs, the FCC created the Universal Service Fund ("USF" or "Fund"). Under section 254(d), each telecommunications carrier that provides interstate telecommunications services must contribute to the Fund. *Universal Service Order,* 12 FCC Rcd at 9173-79 (¶¶ 777-786). The Commission's rules implementing section 254 also imposed USF contribution requirements on two groups of interstate telecommunications providers that are *not* "telecommunications carriers" under the Act: payphone aggregators and private telecommunications providers that offer their services to others for a fee. *Id.* at 9183 (¶ 794). The Commission explained that the public interest required this extension of contribution obligations beyond telecommunications carriers in order to maintain "competitive neutrality" and "broaden the funding base." *Id.* at 9183-84 (¶ 795).

USF contributors make payments to the Fund each month. The amount of a company's monthly USF payment is "based on [the company's] revenues derived from end users for telecommunications and telecommunications services." *Universal Service Order,* 12 FCC Rcd at 9207 (¶ 844). Contributions to the Fund are based only on interstate and international revenues; intrastate revenues are not included in the contribution base. *See TOPUC,* 183 F.3d at 446-48.

Under the current USF rules, each contributor submits a projection of its collected end-user interstate and international telecommunications revenues for the upcoming quarter to the Universal Service Administrative Company ("USAC"), which administers the Fund. After adjusting these projections to eliminate uncollectible contributions and contributions on charges passed through to end users, USAC multiplies the projected revenues by a quarterly "contribution factor" to determine the amount of each contributor's USF assessment. Then USAC reduces each provider's contribution obligation by a "circularity discount" approximating the provider's contributions in the upcoming quarter. *See Federal-State Joint Board on Universal Service,* 17 FCC Rcd 24952, 24969-73 (¶¶ 29-37) (2002) ("*Second Wireless USF Order*"); 47 C.F.R. § 54.709(a)(1)-(3); *Proposed Fourth Quarter 2006 Universal Service Contribution Factor,* 21 FCC Rcd 10120 (OMD 2006).

The Commission establishes a new USF contribution factor each quarter. This factor is "based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total projected collected end-user interstate and international telecommunications revenues, net of projected contributions." 47 C.F.R. § 54.709(a)(2). Assuming that cost and revenue projections are correct, the contribution factor should yield just enough funding to cover the quarterly expenses of the FCC's universal service programs and

USAC's administrative expenses. If a contribution factor is derived from inaccurate projections, it may lead to excessive or inadequate USF contributions in a particular quarter. The Commission takes account of any funding surplus or shortfall from the previous quarter when it sets the contribution factor for the following quarter. *Id.* § 54.709(b)-(c).

Because the USF contribution methodology requires companies to report their projected interstate revenues, it can pose a problem for some providers of wireless telecommunications services. The "mobile nature" of wireless phone calls "makes it difficult to determine whether the calls ... should be classified as interstate or intrastate." *Federal-State Joint Board on Universal Service,* 13 FCC Rcd 21252, 21255-56 (¶ 6) (1998) ("*First Wireless USF Order*"). As a result, not all wireless carriers can easily identify which of their revenues come from interstate telecommunications.

To address this problem, the FCC adopted "safe harbor" percentages that "reasonably approximate" the interstate wireless telecommunications revenues as a percentage of total revenues generated by each category of wireless telecommunications provider. *First Wireless USF Order,* 13 FCC Rcd at 21257 (¶ 11). Wireless carriers may elect to use these safe harbor percentages to estimate their interstate revenues for purposes of calculating their USF contributions. If a wireless provider reports a percentage of interstate telecommunications revenues that falls below the applicable safe harbor, it must "document the method used to calculate its percentage and make that information available to the Commission or [USAC] upon request." *Id.* at 21258 (¶ 11).

In 1998, the Commission initially set the safe harbor for mobile wireless providers at 15 percent of mobile wireless telecommunications revenues. *First Wireless USF Order,* 13 FCC

Rcd at 21258-59 (¶ 13). In light of further information, the Commission in 2002 raised that safe harbor to 28.5 percent. *Second Wireless USF Order,* 17 FCC Rcd at 24965-66 (¶¶ 21-22).

D. The Order On Review

Recent developments have placed the USF "under significant strain." *Order* ¶ 17 (JA). A surge in demand for universal service support has increased the size of the Fund from approximately $4.4 billion in 2000 to approximately $6.5 billion in 2005, and the Commission anticipates that the Fund will continue to grow. *Ibid.* At the same time, "the decline in revenue from traditional long-distance calling is shrinking the base for [USF] contributions." William E. Kennard, Op-Ed, *Spreading the Broadband Revolution,* N.Y. Times, October 21, 2006, at A13. When the FCC adopted its revenue-based system for USF contributions in 1997, assessable interstate revenues were growing at a rate that promised to keep pace with the growth of the Fund. But in recent years, the assessable revenue base has fallen from about $79.0 billion in 2000 to about $74.7 billion in 2004, at the same time that the size of the Fund has continued to grow. *Order* ¶ 18 (JA).

One of the "changing market conditions" that led to the erosion of the revenue base was "the growth of … interconnected VoIP services." *Order* ¶ 17 (JA -). The number of interconnected VoIP subscribers grew from 150 thousand in 2003 to 4.2 million by the end of 2005. *Order* ¶ 19 (JA -). During that period, interconnected VoIP providers were under no obligation to make USF contributions, so they could offer lower rates than their competitors – telecommunications carriers that were required to contribute to the Fund. The more customers that interconnected VoIP providers won from traditional telecommunications carriers, the fewer revenues those carriers received.

The rising demand for universal service subsidies and the diminishing revenue base for USF contributions combined to compel the FCC to raise the contribution factor substantially. "The contribution factor grew from 5.9 percent in the first quarter of 2000 to … 10.9 percent for the second quarter of 2006," sharply increasing assessments on each USF contributor. *Order* ¶ 18 (JA).

In the face of these trends, the Commission has recognized that "there may be merit to fundamental reform of the current USF contribution methodology." *Order* ¶ 21 (JA). Five years ago, the Commission commenced a rulemaking to consider such reform. Options under consideration include assessing contributions "on the basis of a flat-fee charge, such as a per-line charge," and replacing "the existing revenue-based assessment mechanism with one based on the number or capacity of connections provided to a public network" or one based on telephone numbers. *See Order* ¶¶ 11-12 (JA -). But because this issue is both complex and contentious, no "consensus approach to reform" has yet emerged. *Order* ¶ 21 (JA).

While vowing to "continue to pursue long-term fundamental reform of the contribution methodology," the Commission recognized "the need for immediate, interim USF improvements" to relieve the mounting pressure on USF resources. *Order* ¶ 18 (JA). In June 2006, the agency adopted two interim measures to ensure the short-term stability and sufficiency of the Fund. First, on the basis of new information, it raised the mobile wireless safe harbor from 28.5 percent to 37.1 percent. *Order* ¶¶ 23-33 (JA -). Second, it extended USF contribution requirements for the first time to providers of "interconnected VoIP services." *Order* ¶¶ 34-62 (JA -). Due in part to these actions, the contribution factor declined after the adoption of the *Order* to 9.1 percent for the fourth quarter of 2006. *Proposed Fourth Quarter 2006 Universal Service Contribution Factor,* 21 FCC Rcd at 10122.

Petitioners challenge only the second of these interim measures. Their challenges principally concern two issues: (1) the agency's authority to require USF contributions by interconnected VoIP providers; and (2) the Commission's procedures for assessing contributions on those providers.

(1) Authority Over Interconnected VoIP Providers

Section 254(d). The FCC has defined interconnected VoIP as a service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires IP-compatible customer premises equipment; and (4) permits users to receive calls from and terminate calls to the public switched telephone network ("PSTN"). *Order* ¶ 36 (JA); 47 C.F.R. § 9.3. From an end user's perspective, this service is functionally similar to traditional voice telephone service. Employing a broadband (*i.e.*, high-speed) connection to the Internet, users of interconnected VoIP can place calls to and receive calls from anyone with a standard phone line.

To make this service available, interconnected VoIP providers must provide the telecommunications transmission needed to convey interstate calls to and from the PSTN. *Order* ¶ 41 (JA). For that reason, the Commission found that interconnected VoIP providers are "providers of interstate telecommunications" – the types of providers that may be required (if the public interest warrants) to contribute to universal service under section 254(d). *Order* ¶¶ 38-42 (JA -).

The Commission acknowledged that it had "not yet classified interconnected VoIP services as 'telecommunications services' or 'information services' under the definitions of the Act." *Order* ¶ 35 (JA). In the Commission's judgment, resolution of that issue had no bearing on whether providers of interconnected VoIP provide interstate telecommunications.

The classification of interconnected VoIP service will ultimately hinge on the nature of the providers' "offering" to end users. *See Brand X,* 125 S. Ct. at 2702-10.[1] When classifying other service "offerings" as either "telecommunications service" or "information service," the Commission has focused on "what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product." *Brand X,* 125 S. Ct. at 2704. In this proceeding, however, the Commission observed that the scope of its permissive authority under section 254(d) revolved around a different question: not whether the end user is being "offered" a telecommunications service as opposed to an information service, but whether interstate telecommunications is being "provide[d]" to the end user, whatever the classification of the finished product might be. *Order* ¶¶ 38, 40 (JA -).

The Commission reasoned that Congress, by referring to "providers" rather than "offerors" of interstate telecommunications in section 254(d), intended to convey a "different and more inclusive" meaning – "something broader" than an "offer[ing]" seen solely from the consumer's perspective. *Order* ¶ 40 (JA). The agency found support for this reading of the statute in several dictionaries that defined "provide" to mean "furnish" or "supply." *Order* ¶ 40 & n.141 (JA). It therefore decided to "consider the meaning of 'provide' from a supply side, *i.e.,* from the provider's point of view." *Order* ¶ 40 (JA). The Commission found that "from the interconnected VoIP provider's point of view," the provider "provides" not just a finished VoIP service, but also all of the service's "components" – including "transmission." *Ibid.*

[1] The Act defines both telecommunications service and information service as "offerings," and both services employ telecommunications. While telecommunications service involves an "offering of telecommunications," 47 U.S.C. § 153(46), "information service" entails "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 153(20).

The Commission further determined that interconnected VoIP providers provide telecommunications "regardless of whether they own or operate their own transmission facilities or they obtain transmission from third parties." *Order* ¶ 41 (JA). In addition, the agency found that interconnected VoIP providers provide "interstate" telecommunications because their "jurisdictionally mixed" services carry both interstate and intrastate calls. *Order* ¶ 42 (JA).

The Commission went on to conclude that it had the authority under section 254(d) to require these providers of interstate telecommunications to make USF contributions because such contributions would serve the public interest. *Order* ¶¶ 43-45 (JA -). The agency explained that interconnected VoIP providers should contribute to the Fund because they "benefit from universal service" through their interconnection with the PSTN: "Like other contributors to the Fund, interconnected VoIP providers are 'dependent on the widespread telecommunications network for the maintenance and expansion of their business,' and they 'directly benefit[] from a larger and larger network.'" *Order* ¶ 43 (JA -) (quoting *TOPUC*, 183 F.3d at 428).

The Commission also found that extending USF contribution requirements to interconnected VoIP providers would promote "competitive neutrality" by reducing "the possibility that carriers with universal service obligations will compete directly with providers without such obligations." *Order* ¶ 44 (JA). Interconnected VoIP providers have recently "experienced robust growth in subscribership, with the number of subscribers rising from approximately 150 thousand ... in 2003 ... to 4.2 million ... at the end of 2005." *Order* ¶ 19 (JA -). The Commission declared: "As the interconnected VoIP service industry continues to grow, and to attract subscribers who previously relied on traditional telephone service, it becomes increasingly inappropriate to exclude interconnected VoIP providers from universal service contribution obligations." *Order* ¶ 44 (JA).

Finally, the Commission noted that imposing USF contribution obligations on interconnected VoIP providers "will broaden the funding base, lessening contribution requirements on telecommunications carriers or any particular class of telecommunications providers," *Order* ¶ 45 (JA), and helping to alleviate the increasing pressure "on the stability and sustainability of the Fund." *Order* ¶ 34 (JA).

Ancillary Jurisdiction. As an independent source of authority for its action, the FCC invoked its ancillary jurisdiction under Title I of the Communications Act. *Order* ¶¶ 46-49 (JA -). The agency may exercise its ancillary jurisdiction when two conditions are met: (1) Title I "gives the Commission subject matter jurisdiction over the service to be regulated"; and (2) the agency's "assertion of jurisdiction is 'reasonably ancillary to the effective performance of [its] various responsibilities.'" *Order* ¶ 46 (JA) (quoting *United States v. Southwestern Cable Co.,* 392 U.S. 157, 178 (1968)). The Commission found that both conditions were satisfied here.

First, the Commission concluded that its subject matter jurisdiction over "communication by wire or radio" under 47 U.S.C. § 152(a) covered interconnected VoIP services "because they involve 'transmission of [voice] by aid of wire, cable, or other like connection …' and/or 'transmission by radio …' of voice."[2] Then the Commission determined that its requirement that interconnected VoIP providers contribute to the USF was "reasonably ancillary to the effective performance" of its responsibilities under sections 1 and 254 of the Act. *Order* ¶ 47 (JA).

---

[2] *Order* at n.160 (JA) (quoting *IP-Enabled Services,* 20 FCC Rcd 10245, 10262 (¶ 28) (2005) ("*VoIP 911 Order*"), *petitions for review pending, Nuvio Corp. v. FCC,* No. 05-1248 (D.C. Cir. argued September 12, 2006)); *see also* 47 U.S.C. §§ 153(33), (52) (defining "radio communication" and "wire communication").

The Commission found that mandating USF contributions by interconnected VoIP providers would further a primary objective of section 254: "to preserve and advance universal service through specific, predictable, and sufficient contribution mechanisms." *Order* ¶ 48 (JA). Similarly, the Commission found that USF contributions from interconnected VoIP providers would promote the agency's efforts under section 1 to "make available" a nationwide "communication service with adequate facilities at reasonable charges." *Order* ¶ 49 (JA) (quoting 47 U.S.C. § 151)). In support of its assertion of ancillary jurisdiction, the Commission cited this Court's 1988 ruling that Title I authorized the FCC to create a universal service funding mechanism even before the adoption of section 254 to "further the objective of making communications service available to all Americans at reasonable charges." *Ibid.* (quoting *Rural Telephone Coalition v. FCC,* 838 F.2d 1307, 1315 (D.C. Cir. 1988)).

(2) Procedures For Implementation

To enable USAC to calculate how much interconnected VoIP providers must contribute to the USF, those providers must report their projected end-user revenues from interstate and international telecommunications each quarter. *Order* ¶ 52 (JA). The Commission recognized that some of these providers will have trouble complying with this reporting requirement because they "do not currently have the ability to identify whether customer calls are interstate." *Order* ¶ 56 (JA). As it had previously done in the case of wireless services, the FCC decided to establish an interim safe harbor for interconnected VoIP, an estimate of the percentage of interconnected VoIP revenues attributable to interstate telecommunications.

In choosing a safe harbor, the Commission searched for "an appropriate analogue" to interconnected VoIP. *Order* ¶ 53 (JA). It declined to adopt the same safe harbor it had applied to mobile wireless service because it found that certain "characteristics differentiate" interconnected VoIP "from wireless service." *Order* ¶ 55 (JA). In contrast to wireless service, the Commission found evidence that "VoIP traffic is predominantly long distance or international." *Order* ¶ 53 (JA). One industry report estimated that "83.8 percent of VoIP traffic in 2004 was either long distance or international and only 16.2 percent was local." *Ibid.* (citing *iLocus Weekly Newsletter,* September 16, 2005, available at www.ilocus.com).[3]

In addition, the record showed that "interconnected VoIP service is often marketed as an economical way to make interstate and international calls, as a lower-cost substitute for wireline toll service." *Order* ¶ 55 (JA); *see also id.* at n.187 (JA) (listing promotions for various VoIP rate plans that save customers money on interstate and/or international calls). On the basis of this record, the Commission concluded that "the interconnected VoIP safe harbor should be substantially higher than the wireless safe harbor." *Order* ¶ 55 (JA). It reasoned that a safe harbor for interconnected VoIP services should "account for the many customers who purchase these services to place a high volume of interstate and international calls, and benefit from the pricing plans [VoIP] providers offer for such services." *Ibid.*

Given the evidence of extensive interstate use of interconnected VoIP, the agency determined that the closest analogue to this service was not wireless service, but rather "wireline toll service, which similarly offers interstate, intrastate toll, and international services." *Order* ¶ 53 (JA). Consequently, the Commission set the interim safe harbor for interconnected VoIP at 64.9 percent – the average percentage of interstate revenues that wireline toll providers have reported to the FCC. *Ibid.*

[3] A subsequent industry report estimated that 66.2 percent of all VoIP traffic in 2005 was either long distance or international. *Order* at n.181 (JA) (citing *iLocus Weekly Newsletter,* March 21, 2006, available at www.ilocus.com).

At the same time, the Commission sought comment on whether to eliminate or modify this interim safe harbor. *Order* ¶ 69 (JA). In the meantime, the agency made clear that use of the safe harbor was not mandatory. When the safe harbor percentage overstates a company's actual interstate revenues, the company "may instead contribute to the [F]und based on actual revenue allocations or by conducting a traffic study." *Order* ¶ 54 (JA). The Commission encouraged interconnected VoIP providers to "explore these more precise avenues for determining the jurisdictional nature of their revenues." *Ibid.*

The Commission acknowledged, however, that traffic studies have not always proved to be a reliable means of allocating revenues. The record contained evidence that some wireless carriers had relied on inaccurate traffic studies when reporting their interstate revenues to USAC. *Order* ¶¶ 29-31 (JA -). To prevent this problem from recurring in the interconnected VoIP context, the FCC decided to "require prior Commission approval of any traffic study on which an interconnected VoIP provider proposes to rely." *Order* ¶ 57 (JA). "Until the Commission has approved an interconnected VoIP provider's proposed traffic study, that provider may use the interim safe harbor." *Ibid.*

The Commission said that it might eventually extend this pre-approval requirement to wireless traffic studies, but it declined to do so immediately. While it saw some "benefit to parity … between wireless and interconnected VoIP providers," the Commission concluded that "a pre-approval requirement for wireless traffic studies would be disruptive to wireless [USF] contributors who, unlike interconnected VoIP providers, are already relying on the current regime," which does not require pre-approval. *Order* ¶ 57 (JA).

The FCC took "one additional interim action … to ensure the health of the USF pending broader reform." *Order* ¶ 58 (JA). It said that "carriers supplying telecommunications services to interconnected VoIP providers who are not themselves carriers should continue to include the revenues derived therefrom in their own contribution bases for two full quarters" after the effective date of the *Order*. *Ibid.* To ensure compliance with this interim requirement, the Commission waived its rule limiting the USF contribution base to "end-user telecommunications revenues." *Order* ¶ 58 & n.196 (JA) (quoting 47 C.F.R. § 54.706(b)).

As a result of this interim requirement, "the Fund may receive" two separate contributions (from the underlying carrier and the interconnected VoIP provider) that are based on "telecommunications revenues associated with the same facilities," but only for two quarters. *Order* ¶ 59 (JA). Emphasizing that this was "a temporary measure," the agency did "not take this step lightly." *Ibid.* The Commission was "concerned" that if carriers suddenly reduced their USF contribution bases by excluding revenues from transmission sales to interconnected VoIP providers, "the result could be a net decrease in the Fund in the short term." *Ibid.* To avert this undesirable outcome, the Commission decided to continue requiring "contributions from carriers supplying transmission facilities to interconnected VoIP providers for an additional two quarters." *Ibid.*

SUMMARY OF ARGUMENT

The Commission here confronted a serious dilemma: At the same time that demand for universal service subsidies was rising to unprecedented heights, the funding base for those subsidies was declining. The FCC may ultimately need to overhaul its contribution methodology for the Universal Service Fund, and it is continuing to study proposals for comprehensive universal service reform. It rightly recognized, however, that the growing strain on the USF demanded an immediate interim solution to maintain the short-term stability and sufficiency of the Fund. The Commission also understood that the pressure on the Fund stemmed in part from the migration of many consumers from traditional telephone service to interconnected VoIP services, which had not previously been subject to USF contribution requirements. Accordingly, in the *Order,* the Commission reasonably required providers of interconnected VoIP services to start contributing to the Fund.

CCIA and Vonage challenge various aspects of the FCC's decision to impose USF contribution obligations on interconnected VoIP providers. None of petitioners' claims has merit.

I. CCIA's petition for review should be dismissed because CCIA has failed to establish that it has standing. This Court's rules require a petitioner to set forth the basis for its standing in its opening brief. CCIA has not done so, and its standing is not self-evident.

II. The Commission reasonably construed section 254(d) to permit it to require interconnected VoIP providers to contribute to the USF. Section 254(d) authorizes the Commission to mandate USF contributions by providers of "interstate telecommunications … if the public interest so requires." 47 U.S.C. § 254(d). The Commission reasonably concluded that this provision applies to interconnected VoIP providers because they necessarily provide "interstate telecommunications" in the course of transmitting their customers' calls to and from the public switched telephone network. The Commission also reasonably determined that it would serve the public interest to require USF contributions from interconnected VoIP providers. Such a requirement not only broadens the funding base for universal service; it also helps promote competitive neutrality, since interconnected VoIP providers compete with carriers that already contribute to the Fund.

In addition, the Commission reasonably found that its ancillary jurisdiction under Title I provided an independent basis for its authority to require USF contributions by interconnected

VoIP providers. The agency's subject matter jurisdiction under Title I covers interconnected VoIP services, which fall within the statutory definitions of "radio communication" and "wire communication." And the Commission properly determined that the action at issue here was reasonably ancillary to the agency's performance of its statutory responsibilities to preserve and advance universal service. In a similar context, this Court ruled in 1988 that the Commission could assert its ancillary jurisdiction to take action to promote universal service. *Rural Telephone Coalition,* 838 F.2d at 1315.

III. There is no basis for CCIA's claims that the *Order* is inconsistent with other FCC policies. CCIA has failed to identify any policy with which the *Order* conflicts.

IV. The Commission adopted reasonable procedures for implementing its USF contribution requirements for interconnected VoIP providers. Those providers must supply USAC with estimates of their interstate revenues, which USAC then uses to calculate the amount of each provider's USF contribution. To accommodate interconnected VoIP providers that cannot easily distinguish between their interstate and intrastate traffic, the Commission adopted a "safe harbor" percentage that providers may elect to use to estimate their interstate revenues. The agency reasonably set this safe harbor at 64.9 percent – the average percentage of interstate revenues that wireline toll providers have reported to the FCC.

Although Vonage would have preferred a lower safe harbor, it has not shown that the percentage selected by the Commission was unreasonable. Vonage contends that the FCC's safe harbor ignores the similarities between interconnected VoIP and wireless service. The Commission found evidence, however, that VoIP traffic (unlike wireless traffic) is predominantly long distance and international. That evidence supported the Commission's decision to analogize interconnected VoIP to wireline toll service. And that reasonable analogy was the basis for the 64.9 percent safe harbor. The Commission has broad discretion to draw lines of this sort, and it reasonably exercised that discretion here.

In addition, the Commission found record evidence that traffic studies by some wireless carriers have not always produced reliable estimates of interstate revenues for purposes of calculating USF contributions. In light of that evidence, the Commission reasonably required interconnected VoIP providers to obtain prior FCC approval of any traffic studies on which they proposed to rely when reporting their interstate revenues to USAC. Vonage complains that the agency did not apply the same pre-approval requirement to wireless carriers. But the Commission reasonably declined to extend this requirement immediately to the wireless industry. It found that such a requirement would prove disruptive to wireless carriers, which (unlike VoIP providers) have previously relied upon traffic studies to calculate their contributions without seeking prior approval.

Finally, the Commission was justifiably concerned that if it offset the new USF contributions from interconnected VoIP providers by eliminating contributions from carriers supplying transmission to those providers, it might inadvertently cause a net reduction in contributions to the Fund. To guard against that possibility, the Commission reasonably required carriers that supply transmission to interconnected VoIP providers to continue to make USF contributions for two quarters after the *Order*'s effective date.

STANDARD OF REVIEW

CCIA challenges the Commission's conclusion that the Communications Act authorized the agency to require universal service contributions by interconnected VoIP providers. The Court's review of the FCC's statutory interpretation is governed by *Chevron USA v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Under *Chevron,* if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the [Court] is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the implementing agency's reading of an ambiguous statute is reasonable, *Chevron* requires this Court "to accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *Brand X,* 125 S. Ct. at 2699. This rule of deference applies even to an agency's interpretation of its own jurisdiction. *See Oklahoma Natural Gas Co. v. FERC,* 28 F.3d 1281, 1283-84 (D.C. Cir. 1994); *Texas Utilities Electric Co. v. FCC,* 997 F.2d 925, 929-35 (D.C. Cir. 1993).[4]

Insofar as CCIA and Vonage challenge the reasonableness of the FCC's *Order*, the Court must reject their claims unless the *Order* is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review is "highly deferential." *Cellco Partnership v. FCC,* 357 F.3d 88, 93 (D.C. Cir. 2004) (internal quotations omitted). The Court must "presume the validity of the Commission's action," and it may "not intervene unless the Commission failed to consider relevant factors or made a manifest error in

[4] CCIA maintains (Br. 2) that "deference is not appropriate" when a court reviews an agency's interpretation of ambiguous statutory language. CCIA bases that assertion on *Barlow v. Collins,* 397 U.S. 159, 166 (1970) – a case that was decided 14 years before *Chevron.* As this Court has noted, the Supreme Court in *Chevron* displaced an earlier line of cases – including *Barlow* – in which "courts substituted their own interpretations for those of the agencies." *Oil, Chemical & Atomic Workers International Union v. NLRB,* 46 F.3d 82, 90 (D.C. Cir.), *cert. denied,* 516 U.S. 821 (1995). For more than two decades, courts have consistently applied *Chevron*'s deferential standard of review to agency rulemaking orders like the one challenged here. *See, e.g., Pharmaceutical Research & Manufacturers of America v. Thompson,* 362 F.3d 817, 821-22 & n.5 (D.C. Cir. 2004).

judgment." *Mobile Relay Associates v. FCC,* 457 F.3d 1, 8 (D.C. Cir. 2006) (quoting *Consumer Electronics Association v. FCC,* 347 F.3d 291, 300 (D.C. Cir. 2003)).

ARGUMENT

I. CCIA HAS FAILED TO DEMONSTRATE THAT IT HAS STANDING TO CHALLENGE THE ORDER ON REVIEW

A showing of Article III standing "is an essential and unchanging predicate to any exercise of [this Court's] jurisdiction." *American Chemistry Council v. Department of Transportation,* 2006 WL 3316788, *4 (D.C. Cir. 2006) (internal quotations omitted). A party seeking review of agency action has the burden of establishing that it has standing. *See Sierra Club v. EPA,* 292 F.3d 895, 900-01 (D.C. Cir. 2002). This Court's rules provide that a petitioner's opening brief "must set forth the basis for the claim of standing." D.C. Cir. Rule 28(a)(7). Rule 28(a)(7) goes on to state: "When the … petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing." *Ibid.* (citing *Sierra Club,* 292 F.3d at 900-01). CCIA has made no effort to comply with this rule.

CCIA does not even mention standing in its brief, and its standing is hardly self-evident. CCIA is a trade association, but it has not shown that any of its members have standing to sue in their own right. *See Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343 (1977) (describing the prerequisites for associational standing). An association such as CCIA lacks Article III standing if it cannot show that at least one of its members has standing. *See American Chemistry Council,* 2006 WL 3316788, *4; *Rainbow/PUSH Coalition v. FCC,* 330 F.3d 539, 542 (D.C. Cir. 2003).

Before the Commission, CCIA described its members as "a diverse group of companies including software, hardware and communications companies with direct interest in the development of IP-Enabled services" who "need to know whether – and if so, how – the Commission will regulate software and services that use Voice over Internet Protocol." CCIA Comments, May 28, 2004, at 3 (JA). CCIA did not allege that any of its members were VoIP providers who would be subject to the contribution requirements at issue here. Nor did CCIA offer any other reason why any of its members might be harmed by the FCC's decision to require USF contributions by interconnected VoIP providers.

Because its standing was not apparent from the administrative record, CCIA had an obligation under Rule 28(a)(7) to demonstrate its standing in its opening brief. It failed to do so. Accordingly, its petition for review should be dismissed. *See International Brotherhood of Teamsters v. Transportation Security Administration,* 429 F.3d 1130 (D.C. Cir. 2005) (dismissing a petition because the petitioner failed to establish its standing in its opening brief); *KERM, Inc. v. FCC,* 353 F.3d 57 (D.C. Cir. 2004) (same).

II. THE COMMISSION REASONABLY FOUND THAT IT HAD AUTHORITY TO REQUIRE UNIVERSAL SERVICE CONTRIBUTIONS BY INTERCONNECTED VOIP PROVIDERS

Before mandating USF contributions from interconnected VoIP providers, the FCC first determined that it had authority to do so. It identified two separate and independent sources of statutory authority: (1) section 254(d); and (2) Title I of the Communications Act. *Order* ¶¶ 38-49 (JA -). Each of these provisions gave the Commission ample authority to require interconnected VoIP providers to contribute to universal service. If the Court concludes that it has jurisdiction to consider CCIA's challenges, it should reject them on the merits.[5]

A. Section 254(d) Authorized The Commission To Require USF Contributions By Interconnected VoIP Providers

For purposes of interpreting section 254(d), it is essential to understand that the Communications Act distinguishes between the terms "telecommunications service" and "telecommunications." Both of those terms appear in section 254(d). That provision requires carriers that provide "interstate telecommunications services" to contribute to the Fund; and it separately authorizes the Commission to require contributions by other providers of "interstate telecommunications ... if the public interest so requires." 47 U.S.C. § 254(d). The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(46). The statutory term "telecommunications carrier" refers to "any provider of telecommunications services" (except for "aggregators" of such services). *Id.* § 153(44). The Act separately defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43).

In giving content to these definitions, the FCC has construed the term "telecommunications service" to "encompass only telecommunications provided on a common

[5] An intervenor in this case, the VON Coalition, also purports to challenge the agency's authority to require USF contributions by interconnected VoIP providers. *See* VON Coalition Br. 7-14. If this Court dismisses CCIA's petition for review, it should not address this argument. *See AMSC Subsidiary Corp. v. FCC,* 216 F.3d 1154, 1161 (D.C. Cir. 2000) ("only in extraordinary cases will [the Court] address an issue raised solely by an intervenor") (citation and internal quotations omitted), *cert. dismissed,* 531 U.S. 1121 (2001).

carrier basis." *Universal Service Order,* 12 FCC Rcd at 9177 (¶ 785). In other words, a "telecommunications carrier" must be a common carrier, offering service indiscriminately to all potential users. *See Virgin Islands Telephone,* 198 F.3d at 925-27. Accordingly, not every provider of telecommunications is a "telecommunications carrier" that provides "telecommunications service" covered by the mandatory contribution provision of section 254(d). For example, a company that provides telecommunications through privately negotiated contracts – with terms and conditions that vary from one customer to the next – is not a common carrier that provides a "telecommunications service." *See id.* at 925.

Congress incorporated this distinction between "telecommunications" and "telecommunications service" into section 254(d). That provision requires every "telecommunications carrier" that provides "interstate *telecommunications services*" to contribute to the FCC's universal service programs. 47 U.S.C. § 254(d) (emphasis added). In addition, it states: "Any other provider of interstate *telecommunications* may be required to contribute to the preservation and advancement of universal service if the public interest so requires." *Ibid.* (emphasis added). Thus, section 254(d) expressly authorizes the FCC (if the public interest warrants) to extend USF contribution requirements to entities other than providers of telecommunications services. Under this grant of discretionary authority, the Commission may find that the public interest requires contributions by interstate telecommunications providers that do *not* provide "telecommunications service."

The Commission first exercised this authority in 1997, when it initially adopted rules to implement section 254. At that time, the agency found that the public interest required USF contributions from two groups of interstate telecommunications providers that do not fit the Act's definition of "telecommunications carrier": payphone aggregators and private telecommunications providers that offer their services to others for a fee. *Universal Service Order,* 12 FCC Rcd at 9183 (¶ 794).

In this proceeding, the FCC extended USF contribution obligations to interconnected VoIP providers. Although the Commission has not yet decided whether those providers are "telecommunications carriers," it reasonably determined that they are subject to the agency's discretionary authority under section 254(d) because they are "providers of interstate telecommunications." The Commission reasoned that because interstate transmission is an indispensable component of interconnected VoIP service, providers of the service necessarily provide interstate telecommunications. *Order* ¶¶ 39-42 (JA -). That conclusion reflected a reasonable reading of ambiguous statutory language.

The Commission also found that the public interest required USF contributions by interconnected VoIP providers. *Order* ¶¶ 43-45 (JA -). Previously, the Commission had concluded that contributions from payphone aggregators and private carriers were needed to "broaden the funding base" and to preserve "competitive neutrality." *Universal Service Order,* 12 FCC Rcd at 9183-84 (¶ 795). These same considerations provided an even more compelling justification for extending contribution obligations to interconnected VoIP providers.

The escalating demand for universal service subsidies, combined with a receding USF contribution base, convinced the Commission of the urgent need to expand the funding base. *Order* ¶ 18 (JA). The agency reasonably decided that USF contributions by interconnected VoIP providers were "necessary at this time in order to respond to [the] growing pressures on the stability and sustainability of the Fund." *Order* ¶ 34 (JA).

Furthermore, the Commission found that requiring contributions by interconnected VoIP providers would level the competitive playing field, since those companies compete with telecommunications carriers, which already contribute to the Fund. *Order* ¶ 44 (JA). Indeed, the Commission had good reason to believe that the earlier disparity in the USF obligations of interconnected VoIP providers and telecommunications carriers had exacerbated the strain on the USF. The record showed that at the same time that the USF contribution base was shrinking, the number of interconnected VoIP subscribers was growing. *Order* ¶ 34 (JA). This was no mere coincidence. Unlike their telecommunications carrier competitors, interconnected VoIP providers during that period were not required to make USF contributions. Due in part to this disparity, they could afford to offer lower rates to lure customers away from traditional telephone companies. And as those companies lost more customers to interconnected VoIP, their revenues – the basis for their USF contributions – declined. To arrest this trend, it made perfect sense for the Commission to require interconnected VoIP providers to make USF contributions just like their competitors.

Other equitable considerations also informed the agency's decision. In the Commission's reasoned judgment, interconnected VoIP providers, like other contributors, "benefit from universal service through their interconnection with the PSTN" and should assume a contribution burden that corresponds with the benefits they enjoy. *Order* ¶ 43 (JA).

CCIA claims that section 254(d) does not permit the FCC to require interconnected VoIP providers to contribute to the Fund. Proceeding from the premise that "VoIP must be classified as an information service," CCIA asserts: "The plain language of the Act … does not allow the imposition of USF payment obligations on information service providers." CCIA Br. 20-21. Although it purports to base its argument on plain statutory language, CCIA cannot identify any statutory provision that exempts interconnected VoIP providers (or, for that matter, information service providers) from contributing to the Fund. Nor has CCIA given the Court any good reason to question the Commission's reasonable reading of section 254(d).

Even if CCIA were correct that VoIP should be classified as an information service, such a classification would have no effect on the FCC's permissive authority under section 254(d). Of course, if VoIP were classified as an information service (and *not* as a telecommunications service), VoIP providers would not be statutorily mandated to make USF contributions, since section 254(d) *requires* contributions only by providers of "interstate telecommunications *services*." 47 U.S.C. § 254(d) (emphasis added). The statute expressly provides, however, that the FCC may extend USF contribution obligations to any "other provider of interstate telecommunications … if the public interest so requires." *Ibid.* And in this proceeding, the Commission reasonably found that, regardless of how it ultimately classifies interconnected VoIP services, purveyors of those services provide "interstate telecommunications." *Order* ¶ 35 (JA).

Contrary to CCIA's assertion (Br. 28-30), the Supreme Court's *Brand X* decision does not require a different result. The question in *Brand X* was whether cable modem service – an information service that offers high-speed Internet access – should also be classified as a telecommunications service (a common carrier "offering" of telecommunications). The answer to that question depended on the meaning of the ambiguous term "offering" in the statutory definition of telecommunications service. *See Brand X,* 125 S. Ct. at 2702-10. The Supreme Court held that the FCC could reasonably define an "offering" in terms of "what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components." *Id.* at 2704. Consequently, the Court upheld the FCC's ruling that the "telecommunications input used to provide" cable modem service "is not a telecommunications *offering*" because it is inseparable from the service's data processing capabilities. *Id.* at 2709 (emphasis added).

Resolution of the classification issue in *Brand X* thus revolved around the nature of the "offering" to end users. This case concerns a different question: whether a provider of a service that includes interstate transmission is a "provider of interstate telecommunications" subject to the FCC's permissive authority under section 254(d). In addressing this question, the FCC drew a reasonable distinction between the terms "offer" and "provide."

The Commission reasoned that Congress, by referring to "providers" rather than "offerors" of interstate telecommunications in section 254(d), intended to convey a "different and more inclusive" meaning – "something broader" than an "offering" seen solely from the consumer's perspective. *Order* ¶ 40 (JA). Noting that dictionaries commonly define "provide" to mean "furnish" or "supply," the agency construed the term "from a supply side, *i.e.*, from the provider's point of view." *Order* ¶ 40 & n.141 (JA). Under this common sense reading of section 254(d), an interconnected VoIP provider not only provides a finished VoIP service; it also "provides" (*i.e.*, "furnishes" or "supplies") all of the service's "components," including telecommunications "transmission." *Order* ¶ 40 (JA).

CCIA claims (Br. 28) that the Court in *Brand X* held that "it is impermissible under the Act to break apart an integrated service into its constituent elements and regulate them differently." The Supreme Court held no such thing. Indeed, the Court in *Brand X* did not find that the Act mandated or prohibited any particular regulatory approach. Instead, the Court (applying *Chevron*) deferred to the agency's reasonable reading of the Act's ambiguous definition of "telecommunications service." That definition is irrelevant to the issue now before this Court. Because section 254(d) expressly requires USF contributions by all providers of "interstate telecommunications services," the FCC's discretionary authority to assess contributions on others applies only to "other" providers of "interstate telecommunications" – entities that do *not* provide telecommunications service.

In mischaracterizing *Brand X,* CCIA appears to conflate the terms "telecommunications" and "telecommunications service." But the Act distinguishes between the two terms and defines them differently. *See* 47 U.S.C. §§ 153(43), (46). The Supreme Court understood the difference. While it upheld the Commission's ruling that a provider of an integrated information service does not provide "telecommunications service," the Court in *Brand X* seemed to recognize that an information service provider may provide "*telecommunications*" as part of its integrated service. It quoted with approval the FCC's statement that the telecommunications component of cable modem service is "*provided* to the end user."[6]

This description of cable modem service is consistent with the Act's definition of "information service" as an "offering" of data processing capabilities "*via telecommunications*." 47 U.S.C. § 153(20) (emphasis added). By definition, a company cannot provide an information service unless someone also provides the telecommunications transmission that makes the service possible. Given this inextricable link between "information service" and "telecommunications," there is no tension at all between the statutory definitions or *Brand X* and the Commission's conclusion that interconnected VoIP providers "provide" telecommunications.

---

[6] *Brand X,* 125 S. Ct. at 2703 (emphasis added) (quoting *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* 17 FCC Rcd 4798, 4823 (¶ 39) (2002)).

That conclusion would remain valid even if the Commission ultimately classified interconnected VoIP as an information service.[7]

In short, the Commission did not need to decide how to classify VoIP before it could exercise its permissive authority under section 254(d) to require USF contributions by interconnected VoIP providers, because it reasonably found that those entities – whatever their classification – provide interstate telecommunications. Accordingly, there is no merit to CCIA's contention (Br. 35-38) that the FCC "abdicated" its responsibility by declining to resolve the classification issue. Agencies, like courts, need not address every legal question when one is dispositive. *See National Cable & Telecommunications Association v. Gulf Power Co.*, 534 U.S. 327, 338 (2002) (agencies "sometimes dodge hard questions when easier ones are dispositive," and a reviewing court should not "fault the FCC for taking this approach").[8]

---

[7] The Commission's interpretation of the term "provider" in section 254(d) would not subject every information service to the agency's permissive authority to require USF contributions. One information service that falls outside the scope of that authority is Pulver's Free World Dialup ("FWD") service. When Pulver provides FWD, it "neither offers nor provides transmission to its members. Rather, FWD members 'bring their own broadband' transmission to interact with the FWD server." *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service,* 19 FCC Rcd 3307, 3312 (¶ 9) (2004) ("*FWD Order*"). Thus, unlike interconnected VoIP providers, Pulver does not provide telecommunications to its subscribers. Given this fundamental difference between FWD and interconnected VoIP, CCIA's reliance on the *FWD Order* (Br. 24-25, 41 n.35) is misplaced.

[8] *Cf. American Council on Education v. FCC,* 451 F.3d 226, 235 (D.C. Cir. 2006) ("*ACE*") (rejecting an argument that the FCC should have classified VoIP as either a telecommunications service or an information service before deciding whether the Communications Assistance for Law Enforcement Act applies to VoIP providers). The Commission has rightly refrained from making a hasty decision concerning the classification of interconnected VoIP. Such a decision will have significant and far-reaching consequences. If interconnected VoIP were classified as a telecommunications service, the full array of Title II regulation would apply to the service. There was no compelling reason for the Commission to resolve such a difficult question in this proceeding.

CCIA also claims that the *Order* improperly "gives priority to universal service policy" over another "policy of the 1996 Act: keeping the Internet free from regulation." CCIA Br. 30-31 (citing 47 U.S.C. § 230(b)(2)). CCIA mistakenly contends (Br. 31) that the FCC "is not free to pick and choose among congressional policies in interpreting the statute." To the contrary, the Communications Act often seeks to advance conflicting or competing policy goals, and "[only] the Commission may decide how much precedence particular policies will be granted when several are implicated in a single decision." *Melcher v. FCC,* 134 F.3d 1143, 1154 (D.C. Cir. 1998) (quoting *MobileTel, Inc. v. FCC,* 107 F.3d 888, 895 (D.C. Cir.), *cert. denied,* 522 U.S. 948 (1997)). "The Commission is necessarily entitled to substantial deference when it must … balance two congressional policies that cannot both be fully achieved." *NASUCA,* 372 F.3d at 461.

In particular, where (as here) the Act entrusts the FCC to assess whether the public interest requires a certain kind of regulation, "the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference," because "'the weighing of policies under the "public interest" standard is a task that Congress has delegated to the Commission.'" *FCC v. WNCN Listeners Guild,* 450 U.S. 582, 596 (1981) (quoting *FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 810 (1978)). The Commission here reasonably concluded, for reasons well articulated in the *Order*, that the public interest required USF contributions by interconnected VoIP providers. *See Order* ¶¶ 43-45 (JA -).

Finally, CCIA asserts that the phrase "other provider of interstate telecommunications" in section 254(d) "refers to a narrow class of providers" of "traditional" telephone services – a class that does not include interconnected VoIP providers. CCIA Br. 42. CCIA maintains that this alternative statutory construction is "more rational" than the FCC's reading of the statute. *Id.* at

41. Even assuming that CCIA's preferred interpretation of section 254(d) is reasonable, it is not the only possible interpretation of that ambiguous provision. Because section 254(d) is susceptible to more than one reasonable construction, the Court's "task is not to choose the best interpretation but merely to decide if the Commission's is reasonable." *WorldCom, Inc. v. FCC,* 246 F.3d 690, 694 (D.C. Cir. 2001). For all of the reasons discussed above, the FCC reasonably construed section 254(d) to authorize the assessment of USF contribution obligations on interconnected VoIP providers.

B. The Commission Had Ancillary Jurisdiction Under Title I To Require USF Contributions By Interconnected VoIP Providers

The Commission also reasonably found that, wholly apart from its section 254(d) discretionary authority, it had "ancillary jurisdiction under Title I of the Act to extend universal service contribution obligations to interconnected VoIP providers." *Order* ¶ 46 (JA). The agency may exercise its ancillary jurisdiction when: (1) Title I "gives the Commission subject matter jurisdiction over the service to be regulated"; and (2) the agency's "assertion of jurisdiction is 'reasonably ancillary to the effective performance of [its] various responsibilities.'" *Ibid.* (JA) (quoting *Southwestern Cable,* 392 U.S. at 178). The regulation at issue here satisfied both of these conditions.

First, the FCC reasonably found that interconnected VoIP services are within the agency's subject matter jurisdiction over interstate "communication by wire or radio" under section 2(a) of the Act, 47 U.S.C. § 152(a). Specifically, the Commission determined – and CCIA does not dispute – that interconnected VoIP services "are covered by the statutory definitions of 'wire communication' and/or 'radio communication' because they involve 'transmission of [voice] by aid of wire, cable, or other like connection …' and/or 'transmission by radio …' of voice."[9]

Next, the Commission reasonably concluded that the extension of USF contribution obligations to interconnected VoIP providers was "reasonably ancillary to the effective performance" of the agency's duties under sections 1 and 254 of the Act. *Order* ¶ 47 (JA). As the Commission pointed out, expanding the USF contribution base will help achieve a principal goal of section 254: "to preserve and advance universal service through specific, predictable, and sufficient contribution mechanisms." *Order* ¶ 48 (JA). Likewise, by establishing a new source of universal service funding, the Commission can more effectively fulfill its universal service mandate under section 1 to "make available" a nationwide "communication service with adequate facilities at reasonable charges." *Order* ¶ 49 (JA) (quoting 47 U.S.C. § 151).

Section 4(i) of the Act empowers the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). The Commission reasonably exercised this ancillary authority when it required interconnected VoIP providers to make USF contributions.

CCIA argues (Br. 31-32) that the challenged regulation exceeded the scope of the FCC's Title I authority. It bases this argument on *American Library Association v. FCC,* 406 F.3d 689 (D.C. Cir. 2005) ("*ALA*"), in which the Court ruled that the FCC had overstepped the bounds of its ancillary jurisdiction by regulating broadcast "reception equipment *after* the transmission of communication is complete." *Id.* at 703. That case is readily distinguishable. The Court in *ALA* held that the Commission lacked subject matter jurisdiction over devices that are *not* engaged in

[9] *Order* at n.160 (JA) (quoting *VoIP 911 Order,* 20 FCC Rcd at 10262 (¶ 28)); *see also* 47 U.S.C. §§ 153(33), (52) (defining "radio communication" and "wire communication").

communication by wire or radio. *Id.* at 699-705. Here, by contrast, the regulated services clearly involve "communication by wire or radio" as defined by Title I. *See Order* at n.160 (JA); 47 U.S.C. §§ 153(33), (52). CCIA does not even contest the Commission's subject matter jurisdiction over interconnected VoIP services.[10] Thus, the first part of the test for ancillary jurisdiction is conceded.

As to the second part, this Court has already established that agency action to advance the cause of universal service is reasonably ancillary to the effective performance of the FCC's responsibilities under the Act. In 1988, long before Congress amended the Communications Act to add section 254 and authorize the establishment of a universal service fund, the Court held that the FCC could exercise its ancillary authority under Title I to create such a fund "to further the objective of making communication service available to all Americans at reasonable charges." *Rural Telephone Coalition,* 838 F.2d at 1315. The Commission's ancillary jurisdiction to create a universal service funding mechanism in 1988 is surely sufficient in this

[10] It is true, as CCIA asserts (Br. 31), that the FCC may not use its ancillary jurisdiction to take action that conflicts with "the plain language of the Act." But CCIA has not identified any provision of the Act that plainly forbids the Commission to require USF contributions from interconnected VoIP providers.

case to permit the expansion of the funding base in a manner that is not inconsistent with section 254(d).[11]

III. THE COMMISSION'S *ORDER* IS NOT INCONSISTENT WITH OTHER FCC POLICIES

In addition to challenging the FCC's authority, CCIA makes several assertions that the *Order* in this case made an unexplained departure from various FCC policies. CCIA Br. 33-41. These claims are insubstantial.

First, CCIA argues that the *Order* effectively reversed an earlier preemption ruling, the 2004 *Vonage Order*.[12] In that order, the FCC preempted certain types of state regulation of interconnected VoIP services. In the *Order* on review, the Commission noted that if an interconnected VoIP provider developed "the capability to track the jurisdictional confines of customer calls," that provider "would no longer qualify for the preemptive effects of [the] *Vonage Order* and would be subject to state regulation." *Order* ¶ 56 (JA). According to CCIA (Br. 33-35), this statement amounts to an unexplained "reversal" of the *Vonage Order*.

---

[11] The VON Coalition argues (Br. 8) that the Commission may not invoke its ancillary jurisdiction "to mandate USF contributions" because "Congress expressly defined the scope of the Commission's authority to include or exclude entities from USF contribution obligations in section 254(d)." That provision, however, does not expressly exempt *any* entities from contributing to the Fund. Thus, in asserting that section 254(d) limits the scope of the agency's authority, the VON Coalition relies on "the expressio unius maxim – that the expression of one is the exclusion of others." *See Mobile Communications Corp. of America v. FCC,* 77 F.3d 1399, 1404 (D.C. Cir.), *cert. denied,* 519 U.S. 823 (1996). As this Court has recognized, that maxim "has little force in the administrative setting" – particularly when determining the scope of the FCC's ancillary jurisdiction. *Id.* at 1404-05 (internal quotations omitted). The Commission properly found that expressio unius was "'too thin a reed to support the conclusion'" that "Congress intended to limit the Commission's judicially recognized ancillary jurisdiction" over universal service. *Order* at n.171 (JA) (quoting *Mobile Communications,* 77 F.3d at 1405).

[12] *See Vonage Holdings Corp.,* 19 FCC Rcd 22404 (2004) ("*Vonage Order*"), *petitions for review pending, Minnesota Public Utilities Commission v. FCC,* No. 05-1069 (8th Cir. argued January 12, 2006).

Because no party presented this issue to the Commission, CCIA is precluded from raising the issue now. *See* 47 U.S.C. § 405; *In re Core Communications, Inc.*, 455 F.3d 267, 276-77 (D.C. Cir. 2006). Even if this argument were not procedurally barred, it is baseless. As the Commission explained in the *Order*, "the central rationale justifying preemption set forth in the *Vonage Order* would no longer be applicable" to any interconnected VoIP provider that could distinguish between its intrastate and interstate traffic. *Order* ¶ 56 (JA).

In the *Vonage Order,* the Commission preempted state regulation because it found no evidence that the interstate and intrastate components of interconnected VoIP service could practically be separated. *See Vonage Order,* 19 FCC Rcd at 22418-24 (¶¶ 23-32). In that circumstance, preemption was warranted to ensure that state regulation would not infringe on the FCC's jurisdiction over interstate communications.[13] Thus, there is nothing remarkable about the FCC's observation in the *Order* that the development of methods to "track the jurisdictional confines" of VoIP calls would remove the *Vonage Order*'s "central rationale" for preemption of state regulation of interconnected VoIP. *See Order* ¶ 56 (JA). That statement is consistent not only with the reasoning of the *Vonage Order,* but also with the case law governing preemption. *See Louisiana,* 476 U.S. at 375-76.

CCIA also contends that the FCC's regulation of interconnected VoIP in this case is inconsistent with what CCIA believes to be the proper classification of VoIP as "an unregulated information service." CCIA Br. 36. Even if CCIA were correct that VoIP should be classified as an information service, such a classification would not exempt VoIP providers from all

---

[13] *See, e.g., Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 375 n.4 (1986); *Public Service Commission of Maryland v. FCC,* 909 F.2d 1510, 1515-16 (D.C. Cir. 1990); *Public Utility Commission of Texas v. FCC,* 886 F.2d 1325, 1331-35 (D.C. Cir. 1989).

regulation. It is true that information service providers (unlike telecommunications carriers) are generally exempt from common carrier regulation under Title II of the Act. But as the Supreme Court recently observed, "the Commission remains free to impose special regulatory duties on [information service providers] under its Title I ancillary jurisdiction." *Brand X,* 125 S. Ct. at 2708.

There is no basis for CCIA's broad assertion (Br. 33) that the *Order* "opens the door" to comprehensive common carrier regulation of VoIP under Title II. The Commission based its action in this case on its permissive authority under section 254(d) and on its ancillary authority under Title I. Section 254, which pertains solely to universal service obligations, "is unique among the other provisions" of Title II because it permits the Commission to regulate *non-*common carriers as well as common carriers if the public interest requires. *See Federal-State Joint Board on Universal Service,* 13 FCC Rcd 11501, 11565 (¶ 131) (1998). Indeed, the Commission has previously imposed USF contribution requirements on entities that are not otherwise subject to Title II. *See Universal Service Order,* 12 FCC Rcd at 9183 (¶ 794) (requiring contributions from payphone aggregators and private carriers). And the Commission's exercise of ancillary authority to further universal service is not a harbinger of full Title II regulation of those it has required to contribute. The Commission's decision to require interconnected VoIP providers to make USF contributions does not mean that the agency will subject those providers to common carrier regulation. The Commission has not yet decided whether to classify interconnected VoIP as a telecommunications service subject to Title II. *See Order* ¶ 35 (JA).[14]

Finally, CCIA argues that the Commission's assessment of USF contributions on interconnected VoIP services is inconsistent with its treatment of two other Internet-based services: cable modem service and digital subscriber line ("DSL") service (which offers high-speed Internet access via telephone lines). CCIA Br. 38-41. That is incorrect. Regardless of whether interconnected VoIP is being provided over a DSL or cable modem platform or via some other means, all interconnected VoIP providers must contribute to the Fund. *See Order* ¶ 36 (JA). Because the *Order* is agnostic as to the type of technology used to support the service, there is no inconsistency in the agency's treatment of the various forms of interconnected VoIP. To the extent that CCIA is complaining about the treatment of stand-alone DSL and cable modem services, the Commission has reached no final decision on whether to require providers of those stand-alone services to make USF contributions. It has sought comment in a pending proceeding on whether it should exercise its permissive authority under section 254(d) to mandate USF contributions by providers of DSL and cable modem services.

[14] CCIA complains that the FCC's delay in classifying VoIP service "condemns the [VoIP] industry to the worst of both worlds" because VoIP providers must bear the burdens of regulation "while being denied the protections and benefits" that are afforded to telecommunications carriers. CCIA Br. 37. But VoIP providers can always obtain the benefits of common carrier status by voluntarily offering their service on a common carrier basis. *See, e.g., VoIP 911 Order*, 20 FCC Rcd at 10268 n.128 ("if a provider of interconnected VoIP holds itself out as a telecommunications carrier and complies with appropriate federal and state requirements," it is entitled to access to the PSTN under sections 251 and 271 of the Act).

See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 17 FCC Rcd 3019, 3048-54 (¶¶ 65-80) (2002).[15]

In sum, CCIA lacks any foundation for its claims that the *Order* contains unexplained inconsistencies with other FCC policies. CCIA has not identified any policy with which the *Order* conflicts.

IV. THE COMMISSION ADOPTED REASONABLE PROCEDURES FOR IMPLEMENTING UNIVERSAL SERVICE CONTRIBUTION REQUIREMENTS FOR INTERCONNECTED VOIP PROVIDERS

The FCC developed reasonable procedures for calculating the USF contributions of interconnected VoIP providers. Because USF contributions are based on end-user interstate and international telecommunications revenues, interconnected VoIP providers must submit data documenting such revenues to USAC. *Order* ¶ 50 (JA). The Commission recognized that many providers will have difficulty compiling the relevant data because they cannot easily identify their customers' interstate calls. *Order* ¶ 56 (JA). To accommodate those providers, the Commission established two alternative methods for satisfying the revenue reporting requirement. First, interconnected VoIP providers can rely on traffic studies that the Commission has approved. *Order* ¶ 57 (JA). In the absence of such studies, they can use the interim "safe harbor" – a percentage designated by the Commission to identify the portion of

---

[15] The Commission was not obligated to determine the USF contribution obligations of providers of other Internet services before it required interconnected VoIP providers to contribute to the Fund. Rather than resolve all USF contribution issues "in one fell swoop," the Commission reasonably exercised its discretion to address these matters "'one step at a time.'" *See National Association of Broadcasters v. FCC,* 740 F.2d 1190, 1207 (D.C. Cir. 1984) (quoting *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489 (1955)); *see also Brand X,* 125 S. Ct. at 2711 (the FCC "need not immediately apply the policy reasoning" of its cable modem ruling "to all types of information-service providers").

interconnected VoIP revenues deemed attributable to interstate and international telecommunications. The Commission reasonably set this interim safe harbor at 64.9 percent. *Order* ¶¶ 53-55 (JA -).

The Commission explained that it was adopting these interim procedures to maintain the short-term stability of the USF while the agency contemplates more comprehensive universal service reform, which may depart from revenue-based calculations. *Order* ¶ 21 (JA). This Court has previously accorded substantial deference to transitional measures of this sort. *See ACS of Anchorage, Inc. v. FCC,* 290 F.3d 403, 410 (D.C. Cir. 2002); *MCI Telecommunications Corp. v. FCC,* 750 F.2d 135, 140-41 (D.C. Cir. 1984). "Avoidance of market disruption pending broader reforms is … a standard and accepted justification for a temporary rule." *Competitive Telecommunications Association v. FCC,* 309 F.3d 8, 14 (D.C. Cir. 2002) ("*CompTel*"). In accordance with this precedent, the Court should reject Vonage's challenges to the interim rules governing USF contributions by interconnected VoIP providers.

A. The Commission Set A Reasonable Safe Harbor For Interconnected VoIP Service

In selecting a safe harbor for interconnected VoIP, the Commission sensibly searched for "an appropriate analogue" to the service. *Order* ¶ 53 (JA). Although some parties urged the Commission to analogize interconnected VoIP to wireless service, the agency found significant differences between these two service categories. In particular, it found evidence that customers' usage of VoIP (unlike wireless service) "is predominantly long distance or international." *Order* ¶ 53 (JA). A report generated within the industry itself estimated that "83.8 percent of VoIP traffic in 2004 was either long distance or international and only 16.2 percent was local." *Ibid.* (citing *iLocus Weekly Newsletter,* September 16, 2005, available at www.ilocus.com).

According to a subsequent report, 66.2 percent of all VoIP traffic in 2005 was either long distance or international. *Order* at n.181 (JA) (citing *iLocus Weekly Newsletter,* March 21, 2006, available at www.ilocus.com). This evidence supported the Commission's determination that "the interconnected VoIP safe harbor should be substantially higher than the wireless safe harbor in order to properly capture interstate revenues." *Order* ¶ 55 (JA).

The record also showed that "interconnected VoIP service is often marketed as an economical way to make interstate and international calls, as a lower-cost substitute for wireline toll service." *Order* ¶ 55 (JA); *see also id.* at n.187 (JA) (listing promotions for various VoIP rate plans that save customers money on interstate and/or international calls). The Commission reasoned that the safe harbor for interconnected VoIP services should "account for the many customers who purchase these services to place a high volume of interstate and international calls, and benefit from the pricing plans [VoIP] providers offer for such services." *Order* ¶ 55 (JA).

Given the evidence of extensive interstate use of interconnected VoIP, the agency concluded that this service was "much like wireline toll service," which "similarly offers interstate, intrastate toll, and international services." *Order* ¶ 53 (JA). Accordingly, the Commission set the interim safe harbor for interconnected VoIP at 64.9 percent – the percentage of interstate revenues that wireline toll providers have reported to the FCC. *Ibid.*

This "safe harbor is necessarily the product of line drawing." *Order* ¶ 53 (JA). The Commission has "wide discretion to determine where to draw administrative lines." *Covad Communications Co. v. FCC,* 450 F.3d 528, 541 (D.C. Cir. 2006) (quoting *AT&T Corp. v. FCC,* 220 F.3d 607, 627 (D.C. Cir. 2000)). When the Commission sets inherently imprecise numerical benchmarks such as safe harbors, "it is not held to a standard of perfection." *WorldCom, Inc. v. FCC*, 238 F.3d 449, 461 (D.C. Cir. 2001).

While Vonage maintains that the safe harbor is too high (Br. 13-19), the "mere fact that the Commission's exercise of its discretion" in this case "resulted in a line that [Vonage] would have drawn differently is not sufficient to make" the safe harbor "unlawful." *See Covad*, 450 F.3d at 543. Whether or not the number chosen by the Commission is "precisely right," the safe harbor is lawful so long as it falls "within a 'zone of reasonableness.'" *WorldCom*, 238 F.3d at 462 (quoting *Hercules Inc. v. EPA*, 598 F.2d 91, 107-08 (D.C. Cir. 1978)). This Court is "generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn … are patently unreasonable, having no relationship to the underlying regulatory problem." *Covad*, 450 F.3d at 541 (quoting *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998)); *see also NASUCA*, 372 F.3d at 461. Vonage has not shown that the Commission's safe harbor is "patently unreasonable."

Judicial deference to the FCC's line-drawing is especially appropriate in this case because the safe harbor percentage is an interim measure. *See ACS of Anchorage*, 290 F.3d at 410. The agency is contemplating more comprehensive universal service contributions, which may depart from revenue-based contributions. *See Order* ¶¶ 11-12 (JA -).

Vonage makes much of the fact that interconnected VoIP providers, like wireless carriers, provide local service as well as long distance service. Vonage Br. 14. It observes that the FCC previously decided to impose certain obligations on interconnected VoIP providers because consumers use interconnected VoIP (like wireless service) to make local calls.[16] Vonage further

---

[16] *See VoIP 911 Order*, 20 FCC Rcd at 10256-57 (¶ 23); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 20 FCC Rcd 14989, 15009-10 (¶ 42) (2005) ("*CALEA Order*"), *aff'd*, *ACE*, 451 F.3d 226.

notes that in an order preempting some forms of state regulation of interconnected VoIP, the Commission concluded that the service is functionally "*far more similar*" to wireless service than to "traditional local exchange and long distance voice service."[17] Vonage contends that the FCC's refusal to treat VoIP like wireless service in this proceeding is arbitrarily inconsistent with its treatment of VoIP in these earlier orders. Vonage Br. 14-16, 18.

Vonage's argument ignores a simple truth: Analogies that are apt in one context can be inappropriate in another. It is true that interconnected VoIP, like wireless service, provides both local and long distance service. That functional similarity underpinned the Commission's actions in the *VoIP 911 Order,* the *CALEA Order,* and the *Vonage Order.* But it is one thing to recognize (as those orders did) that both interconnected VoIP and wireless service enable customers to place local calls. It is quite another to conclude (as Vonage seems to suggest) that the majority of calls placed by interconnected VoIP users are intrastate calls.

The *VoIP 911 Order* never suggested "that interconnected VoIP traffic is predominantly local." *Order* at n.185 (JA). Neither did the *CALEA Order* or the *Vonage Order.* Therefore, there is no conflict between those orders and the *Order* on review. While both interconnected VoIP and wireless service can be used to make local calls, nothing in the record indicated that users of the two services make the same percentage of local calls. Nor did the record contain any evidence that the majority of interconnected VoIP calls are intrastate calls. To the contrary, the Commission found data reflecting that "VoIP traffic is predominantly long distance or international." *Order* ¶ 53 (JA).

---

[17] *See Vonage Order,* 19 FCC Rcd at 22417-18 (¶ 22).

Essentially, Vonage contends that the safe harbor should be lower because "VoIP providers are more analogous to wireless carriers" than to wireline toll providers. Vonage Br. 18. As this Court has noted, however, agencies have "discretion to reasonably analogize to one set of facts rather than another." *Southern California Edison Co. v. FERC,* 443 F.3d 94, 101 (D.C. Cir. 2006). The Commission reasonably exercised that discretion here when it analogized interconnected VoIP to wireline toll service rather than wireless service. There is no disputing that VoIP providers target long-distance callers in marketing their services. *See Order* ¶ 55 & n.187 (JA). And the Commission is entitled to make the expert judgment that these services are more akin to the services of wireline toll carriers than to wireless services, which are typically offered as a substitute for ordinary local telephone services with long-distance capability.

Vonage questions the reliability of the data cited by the Commission to support a 64.9 percent safe harbor. Vonage Br. 16-17. But neither Vonage nor any other party offered any competing data that might have required a lower percentage. The evidentiary record concerning the nature of VoIP traffic was limited. These evidentiary constraints, however, do not diminish the reasonableness of the Commission's decision. "Where existing methodology or research in a new area of regulation is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information. That is exactly the situation the FCC faced here." *American Public Communications Council v. FCC,* 215 F.3d 51, 56 (D.C. Cir. 2000) (citations and internal quotations omitted). Given "the inherent unreliability of all available information," the Commission reasonably selected a safe harbor on the basis of the best available information, notwithstanding the "admittedly imperfect" quality of the evidence. *See Consumer Electronics Association,* 347 F.3d at 302-03. Furthermore, the

Commission sought comment on whether it should "adjust" the safe harbor, leaving open the possibility that it could modify the percentage if presented with new data. *Order* ¶ 69 (JA -).

In the Commission's considered judgment, setting the safe harbor lower than 64.9 percent "would permit providers that actually provide more interstate service to escape universal service contribution obligations for some of their interstate traffic." *Order* ¶ 54 (JA). The agency reasonably opted to avoid such a result, which would have undercut its efforts to promote universal service. At the same time, recognizing that the safe harbor percentage could be "higher than some providers' actual interstate use," the Commission gave all providers the option of reporting their "actual revenue allocations" or "conducting a traffic study" instead of relying on the safe harbor. *Ibid.* The Commission thus reasonably balanced a variety of factors when choosing a safe harbor for interconnected VoIP. The safe harbor percentage that the Commission selected was well within the range of reason.

B. The Commission Reasonably Required Interconnected VoIP Providers To Obtain Prior FCC Approval Of Any Traffic Studies On Which They Propose To Rely

The record in this case indicated that some wireless carriers had based their revenue reports to USAC on inaccurate traffic studies. In response to this problem, the FCC directed wireless carriers to start submitting their traffic studies to the Commission and USAC when they report their revenues. *Order* ¶¶ 29-31 (JA -). In addition, to ensure that this problem did not spread "to a new technology," the FCC reasonably decided to "require prior Commission approval of any traffic study on which an interconnected VoIP provider proposes to rely" for purposes of USF contributions. *Order* ¶ 57 (JA). "Until the Commission has approved an interconnected VoIP provider's proposed traffic study, that provider may use the interim safe harbor." *Ibid.*

Vonage does not challenge the validity of this pre-approval requirement *per se*. Instead, it complains that the Commission did not impose the same requirement on wireless carriers. Vonage maintains that the agency acted inequitably by requiring only interconnected VoIP providers to obtain advance approval of traffic studies. Vonage Br. 19-21. This argument assumes that those providers are similarly situated to wireless carriers. They are not.

Unlike interconnected VoIP providers, which had never made USF contributions before this proceeding, wireless carriers have been contributing to the Fund since its inception. Thus, at the time the *Order* was adopted, "wireless contributors ..., unlike interconnected VoIP providers," were "already relying" on the existing regime. *Order* ¶ 57 (JA). Under that regime, wireless carriers could base their revenue reports on traffic studies without having to seek prior FCC approval. The Commission reasonably concluded that a sudden ban on this practice would be unduly "disruptive" to wireless carriers that had grown accustomed to the existing rules and were conducting their business in reliance on those rules. *Ibid.*

The Commission held open the possibility that it might "extend" the pre-approval requirement "to wireless traffic studies in the future." *Order* ¶ 57 (JA). But it reasonably declined to do so immediately because it was concerned that an abrupt change would prove "disruptive" to the wireless industry. *Ibid.* When the FCC "acts to maintain the status quo" for a while to ensure that a regulatory change will "cause the least upheaval in the industry," the agency is entitled to substantial deference. *ACS of Anchorage*, 290 F.3d at 410 (quoting *MCI*, 750 F.2d at 141).

Vonage asserts (Br. 20) that "the Commission failed to explain how imposing a pre-approval requirement on new wireless entrants, or on wireless providers that move to traffic studies as a result of the Commission's increased wireless safe harbor, is any more disruptive than imposing a pre-approval requirement on VoIP providers." Vonage appears to be arguing that the Commission should have considered extending the requirement to a subset of the wireless industry: new entrants and carriers that had never before used traffic studies. Neither Vonage nor any other party made this argument to the Commission, so Vonage may not raise the claim here. *See* 47 U.S.C. § 405; *Freeman Engineering Associates v. FCC,* 103 F.3d 169, 182 (D.C. Cir. 1997).

In any event, the Commission did not act unreasonably when it decided not to extend the pre-approval requirement to wireless carriers at this time. "The FCC generally has broad discretion … to defer consideration of particular issues to future proceedings when it thinks that doing so would be conducive to the efficient dispatch of business and the ends of justice." *United States Telecom Association v. FCC,* 359 F.3d 554, 588 (D.C. Cir.), *cert. denied,* 543 U.S. 925 (2004). The agency "need not address all problems in one fell swoop." *Ibid.* (quoting *United States Cellular Corp. v. FCC,* 254 F.3d 78, 86 (D.C. Cir. 2001)). Instead, the Commission may choose to proceed incrementally, addressing an issue "one step at a time." *See Williamson,* 348 U.S. at 489; *see also Brand X,* 125 S. Ct. at 2711 (holding that the FCC "need not immediately apply the policy reasoning" of its cable modem ruling "to all types of information-service providers"). The FCC reasonably adopted an incremental approach here: applying a pre-approval requirement to interconnected VoIP providers first, while contemplating whether to extend the requirement to wireless carriers, which had come to rely on a different set of rules.

C. The Commission Reasonably Decided To Continue Requiring USF Contributions For Two More Quarters From Carriers Supplying Transmission To Interconnected VoIP Providers

Under the FCC's rules, USF contributions are based on "end-user telecommunications revenues." 47 C.F.R. § 54.706(b). The contribution base does not normally include wholesale revenues that a carrier earns from selling transmission to another service provider. The Commission made a temporary exception to this rule in the *Order*. It declared that "carriers supplying telecommunications services to interconnected VoIP providers who are not themselves carriers should continue to include the revenues derived therefrom in their own contribution bases for two full quarters" after the *Order*'s effective date. *Order* ¶ 58 (JA -). To implement this interim requirement, the Commission waived its rule excluding wholesale revenues from the USF contribution base. *Ibid.* (JA).

The Commission had good reason to take this step. Previously, carriers that sold transmission to VoIP providers had included the resulting revenues in their USF contribution bases because VoIP providers were regarded as "end users" of the carriers' services. But after interconnected VoIP providers begin contributing to the Fund, other carriers might immediately reduce their contribution bases by deducting the revenues they receive from transmission sales to interconnected VoIP providers. The Commission was concerned that such a sudden drop in the contribution base could cause "a net decrease in the Fund in the short term" – an outcome at odds with the policies set forth in section 254 and the agency's prime objective in this proceeding: "to ensure a sufficient and sustainable Fund." *Order* ¶ 59 (JA). The Commission reasonably decided to eliminate this risk during a brief transitional period by "continuing to require contributions from carriers supplying transmission facilities to interconnected VoIP providers for an additional two quarters." *Ibid.*

Vonage complains that this temporary measure effectively requires interconnected VoIP providers to contribute twice to the Fund: once directly (on the basis of their own revenues) and once indirectly (as customers of carriers that pass through their USF payments). Vonage Br. 21-23. Vonage contends that the Commission did not adequately justify this "double payment" requirement. It questions the agency's judgment that this interim measure was needed to protect against a possible reduction in the Fund. Vonage asserts that it "cannot conceive of how requiring VoIP providers to contribute directly rather than indirectly could result in lower revenues for the Fund." *Id.* at 22.

To the contrary, at least one commenter stated that if the Commission offset the new USF contributions from interconnected VoIP providers by eliminating contributions from the carriers supplying transmission to those providers, the agency could be "further exacerbating the funding shortfall." VON Coalition Ex Parte Letter, June 14, 2006, at 3 (JA). This concern is not implausible. Even if Vonage is correct in assuming that the retail revenues of interconnected VoIP providers will equal or exceed the wholesale revenues of the underlying transmission providers (*see* Br. 22 n.8), interconnected VoIP revenues could nonetheless yield a smaller USF contribution if a higher percentage of those revenues is attributable to intrastate telecommunications (and therefore exempt from USF assessments). For example, if all of the wholesale revenues from a particular facility or service were derived from interstate telecommunications, while only 65 percent of the retail revenues from the finished service provided to the end user were interstate, a USF assessment on retail revenues would likely produce a smaller contribution than an assessment on wholesale revenues would. Moreover, because the Commission has no history of collecting USF payments from the hundreds of interconnected VoIP providers now doing business, it cannot be sure how many of those providers will make full and timely USF contributions.

In light of these concerns, and given the lack of data about the potential contributions of interconnected VoIP providers and the current contributions of their wholesale telecommunications providers, the Commission reasonably decided that, for the first two quarters after the *Order* took effect, carriers that supply transmission to interconnected VoIP providers should continue to make USF contributions. This temporary requirement serves as a reasonable precaution against the risk that the new USF contribution regime could inadvertently reduce the level of funding. Even assuming that this requirement results in "double payments" by interconnected VoIP providers, any temporary inconvenience to those providers is plainly outweighed by the competitive advantage that they enjoyed during the years when their competitors were required to contribute to the Fund and they were not.

In the past, this Court has repeatedly upheld interim rules that are reasonably designed to avoid market disruption and maintain short-term stability. *See CompTel,* 309 F.3d at 14; *ACS of Anchorage,* 290 F.3d at 410; *MCI,* 750 F.2d at 140-41. It should do likewise here.

CONCLUSION

The Court should deny Vonage's petition for review. It should dismiss CCIA's petition for review for failure to establish standing. Alternatively, the Court should deny CCIA's petition for review.

Respectfully submitted,

James M. Carr

for SAMUEL L. FEDER
GENERAL COUNSEL

THOMAS O. BARNETT
ASSISTANT ATTORNEY GENERAL

James M. Carr

for ERIC D. MILLER
DEPUTY GENERAL COUNSEL

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
ATTORNEYS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

James M. Carr

for RICHARD K. WELCH
ASSOCIATE GENERAL COUNSEL

James M. Carr

for JOHN E. INGLE
DEPUTY ASSOCIATE GENERAL COUNSEL

James M. Carr

JAMES M. CARR
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

November 21, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VONAGE HOLDINGS CORPORATION, ET AL., PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	)))))))))	NO. 06-1276 (CONSOLIDATED WITH NO. 06-1317)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and the Court's order dated September 29, 2006, I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 15074 words.

James M. Carr

JAMES M. CARR
COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

November 21, 2006

STATUTES AND REGULATIONS

Contents:

47 C.F.R. § 9.3

47 U.S.C. § 152(a)

47 U.S.C. § 153(20)
47 U.S.C. § 153(33)
47 U.S.C. § 153(43)
47 U.S.C. § 153(44)
47 U.S.C. § 153(46)
47 U.S.C. § 153(52)

47 U.S.C. § 154(i)

47 U.S.C. § 405

→ § 9.3 Definitions.

ANI. Automatic Number Identification, as such term is defined in § 20.3 of this chapter.

Appropriate local emergency authority. An emergency answering point that has not been officially designated as a Public Safety Answering Point (PSAP), but has the capability of receiving 911 calls and either dispatching emergency services personnel or, if necessary, relaying the call to another emergency service provider. An appropriate local emergency authority may include, but is not limited to, an existing local law enforcement authority, such as the police, county sheriff, local emergency medical services provider, or fire department.

Interconnected VoIP service. An interconnected Voice over Internet protocol (VoIP) service is a service that:

(1) Enables real-time, two-way voice communications;

(2) Requires a broadband connection from the user's location;

(3) Requires Internet protocol-compatible customer premises equipment (CPE); and

(4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

PSAP. Public Safety Answering Point, as such term is defined in § 20.3 of this chapter.

Pseudo Automatic Number Identification (Pseudo-ANI). A number, consisting of the same number of digits as ANI, that is not a North American Numbering Plan telephone directory number and may be used in place of an ANI to convey special meaning. The special meaning assigned to the pseudo-ANI is determined by agreements, as necessary, between the system originating the call, intermediate systems handling and routing the call, and the destination system.

Registered Location. The most recent information obtained by an interconnected VoIP service provider that identifies the physical location of an end user.

Statewide default answering point. An emergency answering point designated by the State to receive 911 calls for either the entire State or those portions of the State not otherwise served by a local PSAP.

Wireline E911 Network. A dedicated wireline network that:

(1) Is interconnected with but largely separate from the public switched telephone network;

(2) Includes a selective router; and

(3) Is utilized to route emergency calls and related information to PSAPs, designated statewide default answering points, appropriate local emergency authorities or other emergency answering points.

→ § 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

United States Code Annotated
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Wire or Radio Communication
General Provisions

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires--

(20) Information service

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(33) Radio communication

The term "radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(43) Telecommunications

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(44) Telecommunications carrier

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the

Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

(46) Telecommunications service

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(52) Wire communication

The term "wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

→ § 154. Federal Communications Commission

(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV--PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Vonage Holdings Corporation, et al., Petitioners,

v.

Federal Communications Commission & USA, Respondents.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing typewritten "Brief For Respondents" was served this 21st day of November, 2006, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

David C. Bergmann
Office of the Consumers' Counsel
10 W. Broad Street
Suite 1800
Columbus OH 43215

Counsel For: National Assn. of State Utility Consumer Advocates

Craig J. Brown
Robert B. McKenna
Qwest
607 14th Street, N.W., Suite 950
Washington DC 20005

Counsel For: Qwest Communications International Inc.

Michael B. Hazzard
Womble Carlyle Sandridge & Rice
1401 Eye Street, N.W.
Seventh Floor
Washington DC 20005

Counsel For: The Voice on the Net Coalition

Glenn B. Manishin
Stephanie A. Joyce
Kelley Drye & Warren LLP
3050 K Street, N.W., Suite 400
Washington DC 20007

Counsel For: Computer & Communications Industry Assn.

Edward H. Shakin
Verizon
1515 North Courthouse Road
Suite 500
Arlington VA 22201-2909

Counsel For: Verizon Communications Inc.

Helgi C. Walker
Wiley, Rein & Fielding LLP
1776 K Street, N.W.
Washington DC 20006

Counsel For: Verizon Communications Inc.

Robert J. Wiggers
U.S. Dept. of Justice
Antitrust Div., Appellate Section
950 Pennsylvania Avenue, N.W., Room 3224
Washington DC 20530-0001

Counsel For: USA

Christopher J. Wright
Harris, Wiltshire & Grannis LLP
1200 Eighteenth Street, N.W.
12th Floor
Washington DC 20036

Counsel For: Vonage Holdings Corporation

Sharon D. Freeman
Sharon D. Freeman